

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Marine Polymer Technologies, Inc.

v.

Civil No. 06-cv-100-JD

HemCon, Inc.

O R D E R

Following a jury verdict and court rulings in its favor on its patent infringement claims against HemCon, Inc., Marine Polymer Technologies, Inc. moved for a permanent injunction against HemCon. HemCon filed a motion to stay the injunction pending appeal. In response to Marine Polymer's objection to the motion to stay, HemCon filed a reply in which it raised new theories to show its likelihood of success on appeal. Marine Polymer moves to strike the new theories raised for the first time in HemCon's reply, or alternatively, designates its motion as notice of its intent to move for leave to file a surreply.

Issues raised for the first time in a reply are deemed to be waived. See, e.g., Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgt. Council, 589 F.3d 458, 474 n.14 (1st Cir. 2009); United States v. Vanvliet, 542 F.3d 259, 265 n.3 (1st Cir. 2008); Monsanto Co. v. Bayer Bioscience N.V., 514 F.3d 1229, 1240 n.16 (Fed. Cir. 2008); Hanna v. Sec'y of the Army, 513 F.3d 4, 16 (1st Cir. 2008). Therefore, in deciding HemCon's motion for a stay,

the court will not consider new issues and theories first advanced in HemCon's reply.

The court finds no authority, however, to strike the reply or any new issues or theories in the reply. Federal Rule of Civil Procedure 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Emphasis added.) HemCon's reply is not a pleading and, therefore, is not subject to Rule 12(f). See, e.g., Information Sciences Corp. v. United States, 86 Fed. Cl. 269, 276 n.1 (Fed. Cl. 2009) (treating motion to strike as responsive filing); Valderrama v. Honeywell TSI Aerospace Servs., 2010 WL 2802132, at \*4-\*5 (W. D. Md. July 14, 2010); Dartmouth Hitchcock Med. Ctr. v. Cross Country Travcorps, Inc., 2009 WL 4738192, at \*1 (D.N.H. Dec. 4, 2009).

Marine Polymer asked, in the alternative, that the motion be considered as notice of its intent to move for leave to file a surreply. Marine Polymer also filed an assented-to motion for leave to file a surreply. Leave is granted to file a surreply to HemCon's motion to stay a permanent injunction.

Conclusion

For the foregoing reasons, the plaintiff's motion to strike (document no. 413) is denied. The plaintiff's assented-to motion for leave to file a surreply (document no. 427) is granted.

SO ORDERED.

  
Joseph A. DiClerico, Jr.  
United States District Judge

August 11, 2010

cc: Julie M. Baher, Esquire  
Celine Jimenez Crowson, Esquire  
Garet K. Galster, Esquire  
Daniel R. Johnson, Esquire  
Heather E. Krans, Esquire  
Joseph A. Kromholz, Esquire  
Raymond A. Kurz, Esquire  
Elizabeth Maher Leonard, Esquire  
Lynda Q. Nguyen, Esquire  
Keith B. O'Doherty, Esquire  
Rebekah L. Osborn, Esquire  
Brian M. Poissant, Esquire  
Daniel D. Ryan, Esquire  
Ognian V. Shentov, Esquire  
Jonathan M. Shirley, Esquire  
Daniel E. Will, Esquire  
Leigh S. Willey, Esquire